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8/15/92

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Dear AARC Friend/Member:

I had hoped to write this overdue letter long ago, but the past year was a very eventful year, one that made extraordinary demands on my time and energies. The good news is that the AARC is still in existence and much better known to the media and the public than it was a year ago. The bad news is that AARC's financial status remains precarious, although somewhat improved over last year.

Despite its very limited resources, AARC did much more to serve the public last year than ever before. From last November through the end of March, AARC's phone calls and visitors probably quintupled over previous years. During this period, AARC received about 25 phone calls a day, many of them from the news media. As a result, AARC got a lot more public attention than it had before. Articles on the AARC were carried in Chronicles of Higher Education, New York Law Journal, Illinois Quarterly, National Journal, and the New York Times (the latter contained many errors). And if you watched the "Nightline" show last November on ABC's brief glimpse of some KGB materials on Lee Harvey Oswald and did not blink while the credits flashed on, you may have noticed that the credit to the AARC lasted at least several nano-seconds.

This publicity has helped AARC survive, but only marginally. AARC is principally of interest to the writers and researchers who actively use it, and for the time being it has to look mainly to them for support.

I have spent a great deal of time the past several months trying to assist in the shaping and passage of legislation to release the JFK records to the public. The congressional interest in releasing Kennedy assassination records began with Oliver Stone's movie "JFK," which had a tag line noting that Congress had locked up its JFK records until the year 2029. The American people put a lot of heat on Congress to free these records, and in January I joined the clamor with an Op-Ed piece in the Washington Post. (A copy is enclosed.)

On March 26th, Cong. Louis Stokes, the former Chairman of the House Select Committee on Assassinations ("the HSCA"), and Sen. David L. Boren, Chairman of the Senate Intelligence Committee, introduced identical bills calling for release not only of HSCA records, but also the records of other congressional

committees and federal government agencies. This represented a dramatic change for Stokes, who had been resisting disclosure of these records for years. But in broadening the bill's coverage to apply to records of other congressional committees and federal agencies and commissions, Stokes has diffused attention from the performance of his committee. In addition, he has made it possible for Congress to avoid release of HSCA's records on the assassination of Dr. Martin Luther King, Jr.

Congress held hearings on these bills (House Joint Resolution 454, Senate Joint Resolution 282) in April and May. Four House Committees have held hearings; the Senate Committee on Governmental Affairs held a hearing on May 12, 1992. Senator John Glenn, Chairman of the Governmental Affairs Committee, invited me to testify before his committee, and I did.

The Senate Governmental Affairs Committee has passed a substitute version of S.J. 282. A House substitute version of H.J. 454 has been marked up by the subcommittee chaired by Rep. Conyers.

The House and Senate substitutes are not identical, although they still contain many common features. In my view, the Senate bill is, on the whole, the better bill, although it, too, has been somewhat weakened by recent changes.

S.J. 282 and H.J. 454 proposed the establishment of an "Assassination Materials Review Board" ("Review Board") which would determine (1) which records constitute "assassination records," and (2) which records or portions of records should be released or have their disclosure "postponed." A major difference between the Senate Substitute and the current House Substitute ("the Conyers Substitute") is that the Senate Substitute provides more definite powers to the Review Board than does the Conyers substitute, which relegates it to the status of an advisory committee. Both substitute bills have eliminated a potentially very important provision which gave the Review Board the power to subpoena witnesses, including the officials and employees of other agencies. The Senate Substitute has, however, partly rectified this omission by giving the Review Board specific powers to direct other agencies to provide records and information to it and to carry out investigations. The Senate Substitute also gives the Review Board power to subpoena private persons.

A second major change concerns the controversy over who will appoint the Review Board. The original bills provided that this power would be exercised by the special judicial panel which appoints special prosecutors. The Justice Department raised constitutional objections to this, arguing that it violated separation of powers. I believe this concern is not spurious, but the legalities of the matter appear to be irrelevant. It is

the politics of the matter which is likely to prove determinative. Reportedly Sen. Carl Levin is concerned that congressional expansion of the special judicial panel device could undermine reauthorization of the legislation which established special prosecutors. Thus, both the Senate Substitute and the Conyers Substitute provide that members of the Review Board be appointed by the President. Although there are a number of strong reasons why this should not be so, it now appears virtually inevitable that President Bush will select the five members of the Review Board, subject to the advice and consent of the Senate. Those of you who feel that Bush should not be given the power to appoint the Review Board should write to Sen. John Glenn, Chairman, Committee on Governmental Affairs, United States Senate, Washington, D.C. 20510; Rep. John Conyers, Chairman, Subcommittee on Economic and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C. 20515-6216; and Jack Brooks, Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C. 20515.

Both the Senate Substitute and the Conyers Substitute give broad scope to the concept of "assassination record," although the Senate Substitute has weakened the breadth of this critical term by deleting the phrase "in any manner or degree" from its definition of an "assassination record" as "a record that relates in any manner or degree to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of" (1) the Warren Commission, (2) the Rockefeller Commission, (3) the Church Committee, (4) the Pike Committee, (5) the House Assassinations Committee; (6) the Library of Congress; (7) the National Archives and Records Administration; (8) any Presidential Library; (9) any Executive agency; (10) any independent agency, (11) any other office of the Federal Government, and (12) any State or local law enforcement office "that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy." Still, the Senate definition appears to be potentially much broader in scope than the Conyers Substitute, which seems to limit "assassination record" to materials created or obtained by federal agencies, committees or commissions during their investigations of the JFK murder. The Senate Substitute seems to include within its scope records which are related to the JFK assassination even if they had no relationship to a prior federal investigation.

Despite deficiencies, the pending legislation is a vast improvement over the present Freedom of Information Act ("FOIA"). Obviously, if the FOIA worked the way it should there would be no need for the proposed legislation. The JFK records legislation differs from the FOIA in several ways. First, unlike the FOIA, which contains a number of "exemptions" from mandatory disclosure, several of which have no time limits, the JFK records legislation eliminates the concept of "exemption" from disclosure

and replaces it with the concept of "postponement." Unlike FOIA, the premise of the proposed law is that eventually all information will be released.

Second, under the FOIA the government agency theoretically bears the burden of sustaining its claim that information is exempt from disclosure, but in practice it is often the requester who must show that disclosure of the information will not harm national security or constitute an unwarranted invasion of personal privacy. Since the agency knows precisely what information is being withheld and the requester usually does not, the agency's ability to characterize the nature of the withheld information to its advantage is considerable, and courts generally defer to the agency's characterizations in the absence of specific contradictory information supplied by the requester. By contrast, the Senate Substitute provides that disclosure of JFK assassination records shall not be postponed unless it is established by "clear and convincing" evidence that one of the grounds for postponement of disclosure applies. This is a much more difficult standard for a government agency to meet.

Third, the grounds for "postponement of disclosure" under the JFK records legislation are themselves narrower than under the FOIA. With respect to information withheld on grounds of national security, a major problem area under the FOIA, a balancing test is required. Thus, the threat to "the military defense, intelligence operations, law enforcement, or conduct of foreign relations" must be of such gravity that it "outweighs the public interest. . . ." Under the FOIA, there is no balancing test.

Disclosure may be postponed if it would reveal:

--"an intelligence agent whose identity currently requires protection";

--"an intelligence source or method which is currently utilized, . . . the disclosure of which would interfere with the conduct of intelligence activities";

--any other matter "currently relating to the military defense, intelligence operations, or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States."

Disclosure may also be postponed if it would reveal the name or identity of "a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person"; or if it could "reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest."

Even if the Review Board determines that a record does not qualify for postponement, the President will be able to stall disclosure if he personally vetoes a specific determination to disclose a record (or a portion thereof). But he cannot delegate this authority; he must exercise it personally. Moreover, under the Senate Substitute, decisions to postpone disclosure must be reviewed annually.

I believe that the JFK legislation will be passed either this summer or next fall, and that this will result in vast amounts of JFK materials being released within the next two or three years. (The Review Board is established for a period of two years, but it may vote to extend its life for one more year.) The official estimate is that the legislation will cover approximately one million pages of records. My own guess is that it may well be two million pages or more.

The Senate Substitute provides that copying fees may be waived under the FOIA standard. In a last-minute development, the Conyers Substitute was amended so as to eliminate a fee waiver by the National Archives and to make it possible that records which have been donated to presidential libraries, such as the materials of the Rockefeller Commission, will not become part of the JFK assassination materials at the Archives. A recent Washington Post article on these amendments is enclosed.

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Bud Fensterwald died a little over a year ago, and many of you sent contributions and/or membership dues shortly thereafter. For those of you who last paid membership dues in 1991, it is time to renew your membership. An envelope is enclosed for this purpose. When you renew your membership you will receive a numbered membership card. This card will be used to determine eligibility for book rentals and reduced xeroxing and research charges for members. (Members are charged ten cents per page; non-members 15 cents per page.)

In the past the AARC has carried a large number of persons on its mailing list who did not pay dues. The mailing list now contains over a thousand names, but this past year only about 300 persons paid dues. (Persons who made contributions of \$25.00 or more are considered members even if they did not apply for membership and indicated only that they were making a donation.) Given its meager financial resources, the AARC will no longer carry persons on its mailing list who do not pay their dues.

The AARC has been given a 286 computer by one of its members and supporters. The computer is currently being used in a project to identify key documents on the JFK assassination. Two AARC volunteers are perusing JFK assassination literature to identify these documents. Once assembled they will be indexed and cate-

gorized and published on microfiche. I believe this project will enable AARC to earn a substantial sum of money to support its existence and other projects.

I wish to give special thanks to Elizabeth ("Liz") Woodbury, who has left Washington, D.C. and will enter music school this fall. Liz began working as my part-time legal secretary and office assistant last summer. She soon became the AARC's researcher and office manager, handling many of the inquiries from the news media and our members with patience and aplomb. She helped hold the AARC together during a very difficult period when its human and financial resources were stretched very thin but the public and the media were incessantly demanding its services. For this, we all owe her a debt of gratitude.

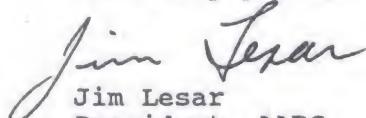
I have hired two new part-time assistants. Allison Ross will work for the AARC from 9:15 a.m. to 12:15 p.m. Mondays, Wednesdays, and Fridays. Christina Lim will work for my law office from 3:15 to 6:15 Tuesdays, Wednesdays and Fridays. In addition, Peter Novick will be doing research in the AARC's files for those who hire him to do so.

The AARC Board of Directors met on June 20th and voted to establish a quarterly newsletter. The first issue should be due out this fall. The AARC has not yet decided how much it will cost to subscribe to the newsletter. Those who are interested in subscribing should check the appropriate box on the enclosed envelope or drop the AARC a note.

The news media have been filled with articles and letters on Oliver Stone's movie "JFK", and the AARC has compiled a large clippings file on this subject. One of the debates renewed by the movie and by John Newman's book JFK and Vietnam is whether President Kennedy intended to withdraw from Vietnam at the time he was shot. Because many of you may not have seen them, I enclose a copy of an article by Prof. Arthur Schlesinger which appeared in the Wall Street Journal and letters to the New York Times by Roger Hilsman and John Newman which deal with this subject.

Best regards to everyone,

Sincerely yours,


Jim Lesar
President, AARC